(1)

90-374

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM DOWNS,
Petitioner

vs.

LAURA F. CAVAZOS, *Secretary,*
United States Department of Education, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether collection of a government guaranteed student loan by means of the tax refund offset program (26 U.S.C. 6402 (d) and 31 U.S.C. 3720A) deprived Petitioner of his right to a trial by jury in an action in debt contrary to the Seventh Amendment.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, William Downs, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on April 13, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unpublished (No. 89-2772) and is reproduced at App. 1. The opinion of the United States District Court for the District of Maryland (R88-2662) is unreported and is reproduced at A11.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 13, 1990 (A.1), and a Petition for Rehearing and Suggestion for Rehearing En Banc was denied on June 4, 1990. This Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Seventh Amendment to the Constitution of the United States:

AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

---

26 U.S.C., Section 6402 (d)

* * *

"Upon receiving notice from any Federal agency a named person owes a past due legally enforceable debt (other than any OASDI overpayment and pastdue support) to such agency, the Secretary shall—

(A) reduce the amount of any overpayment payable to such person by the amount of such debt;

(B) pay the amount by which such overpayment is reduced under sub-paragraph (A) to such agency; and

(C) notify the person making such overpayment that such overpayment has been reduced by an amount necessary to satisfy such debt.

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31 U.S.C., Section 3720A

"(a) Any Federal agency that is owed a past-due legally enforceable debt (other than any OASDI overpayment and past-due support) by a named person shall, in accordance with the regulations issued pursuant to subsection (d), notify the Secretary of the Treasury of the amount of such debt.

(b) No Federal agency may take action pursuant to subsection (a) with respect to any debt until such agency—

(1) notifies the person incurring such debt that such agency proposes to take action pursuant to such paragraph with respect to such debt;

(2) gives such person at least 60 days to present evidence that all or part of such debt is not past-due or not legally enforceable;

(3) considers any evidence presented by such person and determines that an amount of such debt is past due and legally enforceable; and

(4) satisfies such other conditions as the Secretary may prescribe to ensure that the determination made under paragraph (3) with respect to such debt is valid and that the agency has made reasonable efforts to obtain payment of such debt."

* * *

STATEMENT OF THE CASE

The Petitioner received three guaranteed student loans, only the most recent of which is involved in this case. That loan, in the amount of $2,500 was made in 1979 by Equitable Trust Company of Baltimore to Petitioner for his attendance at the University of Baltimore. United Student Aid Funds, Inc., ("United) a nonprofit organization which guarantees student loans made by banks and financial institutions, guaranteed repayment of the loan. The loan was later assigned to the Student Loan Marketing Association and was serviced by the Educational Loan Servicing Center, Inc. ("ELSC"). Beginning in May, 1983, ELSC attempted to secure repayment.

Petitioner made five payments totaling $213. He was sent, but did not receive, at least six late notices and/or delinquency letters. A number of phone calls regarding the delinquency were placed to Mr. Downs, without successfully contacting him. On January 3, 1984, ELSC filed a default claim with United on its loan guarantee. On February 17, 1984, United paid $2,451.88 to honor the default claim and sought reimbursement from the Department of Education under its reinsurance agreement. The full amount was reimbursed.

On September 27, 1986, United conditionally assigned title to Petitioner's loan, along with many other defaulted loans, to the Department of Education. Pursuant to its agreement with the Department of Education, United sent pre-offset notices to each of the debtors whose loans had been assigned to the Department of Education. On or about October 1, 1986, United sent Petitioner a notice of the proposed offset to be conducted in 1987. Petitioner received the notice and used the reverse side of it to make a request for a copy of the promissory note for his loan.

The request, made through Aman Collection Services ("Aman") was relayed to United which sent Petitioner a copy of the promissory note. The day after Petitioner received the loan documents from Aman, he received a notice, also from Aman, that he owed $6,420.93 to United instead of the

$2,597.38 demanded of him in the notice he received from the Departmnet of Education. Aman advised Petitioner that it had "no other choice but to refer this account to our client's designated attorney in your jurisdiction." Petitioner was told that if "the account is sued and judgment is obtained, it could prove to be expensive. Also, there is a strong chance of attachment of wages, bank accounts or property." Petitioner was urged to call "right away so we could make a deal."

On December 8, 1986, Petitioner acknowledged receipt of Aman's letter and advised Aman that all information requested had been furnished, and that he would "do no more until you can prove that I owe $6,420.93 which I have requested." Petitioner further inquired as to whether Aman was sure he was "the person you are trying to collect from" and stated that if Aman would in fact "turn this over to your attorney, maybe I could get some answers." Petitioner received no response to his inquiry and awaited service of the suit Aman threatened to file against him, confident that he could defend himself adequately in a court of law. The suit was never filed, and in April of 1987, the Internal Revenue Service notified Petitioner that a tax refund due him and his wife had been withheld in satisfaction of his defaulted student loan.

In granting summary judgment, the United States District Court for the District of Maryland stressed that the Department of Education's right to collect a "past-due, legally enforceable" student loan debt by offset against a tax refund exists independently of any right the Department has to collect the debt by a lawsuit. Petitioner contends that whether or not a debt is legally enforceable is a matter to be determined by a court of law, in which he has a right to a trial by jury. Relying upon *Atlas Roofing Co. v. Occupational Safety and Health Comm'n*, 430 U.S. 442 (1977) and *Pernell v. Southall Realty*, 416 U.S. 363 (1974) the lower courts avoided the issue by holding that the Seventh Amendment does not require an administrative agency to provide adjudication by a jury.

ARGUMENT

In *Atlas, supra*, this Court drew a distinction between "private rights" and "public rights" and held that denial of a jury trial is constitutionally permissible under regulatory schemes devised by Congress pertaining to "public rights" and rights which have been granted by statute which were not in existence, or were dissimilar from, rights existing in the common law at the time the Seventh Amendment was adopted. Suits for damages for breach of contract were held to be suits at common law with the issues of the making of the contract and its breach to be decided by a jury. *Id.*, pages 458, 459. Administrative fact finding was permissible when the government was involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights.

In *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50, (1982) this Court stated that, "the right to recover contract damages" cannot be deemed "public rights," and the authority of Congress to control the manner in which such rights were adjudicated, through assignment of historically judicial functions to a Non-Art. III "adjunct" plainly must be deemed at a minimum. The holding in *Northern Pipeline Co.* was synopsized in *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, at 584 (1985) as follows:

> ". . . Congress may not vest in a Non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants and subject only to ordinary appellate review . . ."

Recently, this Court in *Tull v. United States*, 481 U.S. 412 (1987), held that an action by the United States to recover a civil penalty under the Clean Water Act is analogous to an action in debt under the common law and as such requires a jury trial under the Seventh Amendment.

These decisions teach that Non-Article III Courts and administrative agencies cannot be given jurisdiction by Congress

over matters which are traditionally the subject of a suit at common law to which the right to trial by jury is guaranteed by the Seventh Amendment. Moreover, the presence of the United States as a party or as a litigant does not convert what is essentially a "private right" into a "public right." Petitioner's debt was initially owed, not to the United States Government or any of its agencies, but to a private bank. Between Petitioner and the bank, and its ultimate assignee, the Department of Education, the existence of a debt is a question of fact which, at common law, was tried to a jury. The Congress may not deprive Petitioner of that constitutionally guaranteed right by the fiction of an offset when, in fact, no "legally enforceable" debt has been established in a court of law. Between Petitioner and the bank, the issue was whether the debt was incurred, and if incurred, whether it had been paid, and if not paid, whether it had been discharged in either of Petitioner's two prior bankruptcy proceedings.

Heretofore, the tax offset statutes have been used to collect taxes through the Internal Revenue Service from amounts it owes to the same taxpayers. They have also been used to offset support payments which a court of competent jurisdiction has ordered a taxpayer to pay to his or her spouse. Such debts are at least arguably "legally enforceable." Debts to private banks, which have been assigned to a variety of congressionally created entities are not, in the absence of a finding by a court of law, "legally enforceable" in the same sense as are support payments.

If the action of Congress in authorizing the collection of private debts due to banks for guaranteed student loans is upheld in this instance, the tax offset statute could be used to collect other debts due to private banks, such as bank card accounts. Arguably, the FDIC, having insured depositors in such banks, could take an assignment of the bank's accounts receivable, and the United States, in the event of the bank's failure—having paid off the depositors in the meantime—could then proceed to seize, administratively, tax overpayments due the debtors in satisfaction of their charge card accounts. The

Seventh Amendment, enacted to prevent arbitrary government action, would become a nullity. Such a result should be discouraged in its incipience.

CONCLUSION

For the foregoing reasons, the Supreme Court is requested to issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review and consider whether Congress, in enacting the Tax Refund Offset Statute for the collection of student loans, deprived Petitioner and others similarly situated, of a right to a jury trial guaranteed by the Seventh Amendmet.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ——— day of August, 1990, a copy of the foregoing Petition for Writ of Certiorari was mailed to Stuart M. Gerson, Assistant Attorney General, Breckinridge L. Willcox, United States Attorney, William Kanter, Esquire, and Ira C. Lapu, Esquire, Attorneys, Appellate Staff, Civil Division, Room 3617, Department of Justice, Washington, D.C. 20530-0001.

Edward L. Blanton, Jr.

United States Court of Appeals for the Fourth Circuit

No. 89-2772

William Downs,

Plaintiff-Appellant,

versus

Laura F. Cavazos, Secretary,
United States Department of Education,

Defendant-Appellee,

and

M. Peter McPherson, Acting Secretary,
United States Department of the Treasury;
United States Student Aid Fund, Inc.;
Internal Revenue Service, both instrumentalities of the
United States of America,

Defendants.

Appeal from the United States District Court for the
District of Maryland, at Baltimore.

Norman P. Ramsey, District Judge.
(CA-88-2662-R)

Argued: March 5, 1990 *Decided: April 13, 1990*

Before MURNAGHAN, Circuit Judge, BUTZNER, Senior Circuit Judge, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Edward Lee Blanton, Jr., BLANTON & McCLEARY, Baltimore, Maryland, for Appellant. Ira C. Lupu, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Stuart M. Gerson, Assistant Attorney General, William Kanter, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Elizabeth Harris, Office of General Counsel, UNITED STATES DEPARTMENT OF EDUCATION, Washington, D.C.; Breckinridge L. Willcox, United States Attorney, Larry D. Adams, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

William Downs seeks a declaration in this appeal that 31 U.S.C. §3720A and 26 U.S.C. §6402(d) deprive him of his Seventh Amendment right to a jury trial. The two statutes direct federal agencies to refer debts owed the federal government to the Secretary of the Treasury and authorize the Secretary to collect the debts by keeping any tax refunds debtors would otherwise receive. In this case Downs's 1986 tax refund was retained to satisfy an educational debt he owed the Department of Education.

The district court granted summary judgment on the Seventh Amendment issue as well as Downs's other constitutional challenges to the statutes. Because we find no merit in Downs's appeal, we affirm for reasons adequately stated by the district court. *See Downs v. McPherson*, C/A No. 88-2662-R (D.Md. July 17, 1989).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 11, 1990

No. 89-2772

Downs v. Cavazos, Sec.

MANDATE

The judgment of this court dated 4/13/90 takes effect today.

John M. Greacen
Clerk

In The United States District Court for the District of Maryland

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William Downs
Plaintiff

v.

M. Peter McPherson, et al.
Defendants

Civil Action No. R-88-2662

MEMORANDUM AND ORDER

Plaintiff William Downs brought this action to contest the offset of his 1986 federal income tax refund against an overdue student loan. Plaintiff seeks a declaratory judgment that 31 U.S.C. §3720A and 26 U.S.C. §6402(d) are unconstitutional in that they violate his Fifth Amendment right to due process of law. In particular, plaintiff argues that these statutes and the regulations, policies and practices implemented pursuant to these statutes, deprived him of fair notice of the alleged debt and the right to a hearing to contest the validity of that debt. Plaintiff further contends that the statutes are unconstitutional in that they fail to guarantee the right to a trial by jury in an action for collection of a debt and thereby violate the Seventh Amendment. Finally, plaintiff alleges that defendant's offset action violated a statute of limitations. In addition to declaratory relief, Mr. Downs seeks the return of the amount of the tax refund that was offset by the government, $2,626.43.

Plaintiff originally brought this action against M. Peter McPherson, Acting Secretary for the United States Department of Treasury; Laura F. Cavazos, Secretary of the United States Department of Education ("DOE");[1] United States Aid Funds, Inc. ("USA Funds"); and the Internal Revenue Service ("IRS"). By its Memorandum and Order of December 20, 1988, the Court granted defendants', McPherson and the IRS, motion to dismiss the case against them.[2] Only the Secretary of Education and USA Funds remain defendants in the suit.

Before the Court is the Department of Education's motion for summary judgment in its favor. Plaintiff has responded to the motion and the time for DOE to reply has elapsed. Find-

[1] Pursuant to Rule 25(a), Fed.R.Civ.P., Laura F. Cavazos' name has been substituted for William J. Bennett as Secretary of Education.

[2] By its Order of January 4, 189, the Court amended its December 20th Order, clarifying that the case had been dismissed only against the two moving defendants, M. Peter McPherson and the Internal Revenue Service.

ing no need for oral argument, the Court now rules pursuant to Local Rule 6 (E) (D.Md. 1988). For the reasons stated herein, defendant's motion will be granted.

Standards for Summary Judgment

Summary judgment shall be granted only if it appears that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56. All evidence shall be viewed in the light most favorable to the plaintiff. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). But the plaintiff must meet the burden of proof by showing more than the existence of a scintilla of evidence; evidence must be produced sufficient for a reasonable jury to find in plaintiff's favor. *Anderson v. Liberty Lobby*, 106 S.Ct. 2505, 2512 (1986). This standard "mirrors the standard for a directed verdict." *Id.* at 2511. The plaintiff has the burden of producing evidence that would support a jury verdict, "even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery." *Id.* at 2514. Once the defendant has pointed out the absence of an essential element of plaintiff's case, the burden is on the plaintiff to make a sufficient showing to create a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986). It is against these standards that the Court considers the Department of Education's motion for summary judgment.

Factual Background

United States Aid Funds, Inc. is a non-profit organization which guarantees student loans made by banks and other financial institutions. USA Funds participates in the Guaranteed Student Loan Program (now known as the Stafford Loan Program) authorized under Title IV Part B of the Higher Education Act of 1965) as amended, ("HEA"), 20 U.S.C. §§ 1071-1087-2. DOE provides interest subsidies to those lenders on qualifying loans guaranteed by USA Funds and provides reinsurance coverage to USA Funds for losses incurred in honoring

claims by lenders on the guarantees in the case of default, death, disability, or bankruptcy discharge of the borrowers.

Federal law requires guaranty agencies to use due diligence in collecting defaulted loans, and DOE regulations now require certain minimum collection efforts. Congress has amended HEA to require agencies to report defaulted loans to credit bureaus and to provide incentives for agencies to adoptad administrative wage garnishment procedures. DOE encourages collection agencies to use other methods as well. Although DOE is entitled to take assignment of a defaulted student loan after making a reinsurance payment to the guaranty agency, ordinarily the agency retains title to the defaulted loan. Guaranty agencies are required to remit to DOE a share of any payments received from debtors.

In September 1985, DOE began a program in cooperation with the IRS to collect defaulted federally-financed student loans by offset against federal income tax refunds. As part of this program, DOE entered into agreements with guaranty agencies, including USA Funds, with respect to guaranteed student loans on which DOE has made reinsurance payment to the agencies. Under these agreements, the guaranty agency, on behalf of DOE, gave student loan debtors notice of the proposed offset action. The agency would also provide the debtor with access to records pertaining to the loan and initial administrative reviews of the debtor's objections to the proposed offset. DOE provided the text of the notice and established, in its agreements with the agencies and in relevant regulations, the administrative procedures that the agencies were, at a minimum, to follow in responding to the debtors.

Debtors who were dissatisfied with the agency's determination could receive, upon request, a review of their objections by a DOE official authorized to resolve the account. Under both USA Funds' and DOE's, practice, debtors who did not object in a timely manner to the pre-offset notice would nevertheless receive a review of their objections. The debtor who objected late incurred the risk that the offset might occur be-

fore USA Funds or DOE could complete review of the objections. However, if the objections were proven to be valid, any amount collected by offset that the debtor did not owe would be refunded.

Mr. Downs received three guaranteed student loans. Only the most recent of the three is involved in the offset action at issue here. The loan, in the amount of $2,500, was made in 1979 by Equitable Trust Company of Baltimore to Mr. Downs for his attendance at the University of Baltimore. USA Funds guaranteed repayment of this loan. The loan was later assigned to the Student Loan Marketing Association and was serviced by the Educational Loan Servicing Center, Inc. ("ELSC"). Beginning in May, 1983, ELSC attempted to secure repayment of this loan. Mr. Downs made five payments totaling $213.00. ELSC records, attached to defendant's summary judgment motion, report that ELSC sent at least six late notice/delinquency letters and made a number of phone calls regarding the delinquency to Mr. Downs without success. On January 3, 1984, ELSC filed a default claim with USA Funds on its loan guarantee. On February 17, 1984, USA Funds paid $2,451.88 to honor the default claim, and then claimed reimbursement for that amount from DOE under its reinsurance agreement. Education reimbursed USA Funds for the full amount.[3]

Thereafter, as required by DOE regulations and consistent with its responisbilities under the Guaranteed Student Loan Program, USA Funds attempted to secure repayment from Mr. Downs. USA Funds sent demand letters to Downs and also directed a collection agency it retained to try to collect from Downs by letters and telephone calls.[4]

[3] USA Funds later received a $257.28 rebate to Downs' loan from the lender, reducing the net principal amount owed to $2,194.60. USA Funds remitted that payment to DOE.

[4] Aman Collection Services ("Aman"), USA Funds' collection contractor, contacted Downs and, according to Downs, notified him that he owed $6,420.93 to USA Funds. In his response to defendants' mo-

On September 27, 1986, USA Funds conditionally assigned title to Mr. Downs' loan, along with many other defaulted loans, to the Department of Education. Pursuant to its agreement with DOE, USA Funds sent pre-offset notices to each of the debtors whose loans had been assigned to DOE. On or about October 1, 1986, USA Funds sent Mr. Downs a notice of the proposed offset to be conducted in 1987. Mr. Downs received the notice and used the reverse side of it to make a request for a copy of the promissory note for his loan. Downs' request, made through the Aman collection agency, was relayed to USA Funds which sent him a copy of the promissory note. In April 1987, the IRS notified Downs that a tax refund had been withheld in satisfaction of his defaulted student loan. Neither before or after the offset did Mr. Downs raise any objection that the 1979 loan was not past-due or not legally enforceable by offset.[5] His first objection came in the filing of this lawsuit.

---

tion for summary judgment, plaintiff refers to Aman as an agent of DOE. However, Aman was under contract with USA Funds and was the designated contact point for responses to requests for access to records on USA Funds accounts. The alleged discrepancy between the amount Aman sought to collect and the amount actually offset by the IRS is not at issue here. The amount of the offset, $2,626.43, is the only contraverted amount before the Court.

[5] In December of 1986, Downs responded to Aman's letter which allegedly notified Downs that he owed $6,420.93 to USA Funds. Downs wrote to Aman that he would "do no more until you can prove that I owe $6,420.93." However, with respect to the notification of offset, Downs' only response was his written statement that the amount owing "may or may not be true" and his request for a copy of the note.

Plaintiff's Challenge to the Notice and Hearing Requirements of the Offset Statutes, Regulations, and Policies

Based on these facts, Mr. Downs has brought this suit challenging the constitutionality of the applicable statutes on their face and in their application to him. Specifically, plaintiff challenges 31 U.S.C. §3720A which directs federal agencies to refer past-due, legally enforceable debts owed to them to the Secretary of the Treasury for collection by reduction of refunds of overpayments of federal taxes by the debtors. Plaintiff also challenges 26 U.S.C. §6482(d) which authorizes the IRS to intercept tax refunds in order to offset past-due debts owed to federal agencies. In addition, Mr. Downs challenges the regulations promulgated under those statutes and the policies and practices used by defendant DOE in implementing those regulations. Mr. Downs' complaint alleges that the statutes, regulations, and the policies and practices thereunder violate the due process guarantee of the Fifth Amendment and the Seventh Amendment's guarantee of the right to a trial by jury.

Plaintiff's basic contention is that the statutory and regulatory scheme governing the offset program fails to provide the debtor with adequate notice or an opportunity to contest the offset. In addition to challenging the legal provisions, Mr. Downs asserts that in handling his case, defendants failed to provide him with sufficient notice or opportunity to be heard in objecting to the offset. Moreover, Downs claims that the IRS's action was barred by the statute of limitations. Finally, plaintiff asserts that in an action to collect on a past-due debt, he has a right to a trial by jury.

Defendant Department of Education has moved for summary judgment in its favor on all of plaintiff's claims. At the outset, defendant asserts that plaintiff's challenge to 26 U.S.C. §6402 is misplaced. That statute authorizes the IRS to per-

form the offset; it does not include the notice and hearing requirements raised in plaintiff's complaint. 26 U.S.C. §6402 (d) (c) requires the IRS to notify the debtor that his refund has been reduced—the only notice required of the IRS occurs after the offset. The IRS was dismissed by this Court's Order of December 20, 1988; the adequacy of its post-offset notice is not at issue here.

The Court will therefore focus on Mr. Downs' challenge to 31 U.S.C. §3702A and the regulations promulgated thereunder. That statute sets forth the preconditions a federal agency must meet before it refers a debt to the IRS for collection by offset of a refund:

> No Federal agency may take action pursuant to subsection (a) with respect to any debt until such agency—
>
> (1) notifies the person incurring such debt that such agency proposes to take action pursuant to such paragraph with respect to such debt;
>
> (2) gives such person at least 60 days to present evidence that all or part of such debt is not past-due or not legally enforceable;
>
> (3) considers any evidence presented by such person and determines that an amount of such debt is past due and legally enforceable; and
>
> (4) satisfies such other conditions as the Secretary may prescribe to ensure that the determination made under paragraph (3) with respect to such debt is valid and that the agency has made reasonable efforts to obtain payment of such debt.

31 U.S.C. §3702A (b). Plaintiff argues that this statute is constitutionally infirm because it does not "define the nature or extent of the opportunity to contest the debt which must be given to the debtor." Downs also challenges the statute's constitutionality on the grounds that it fails to specify the content of the notice that must be given and fails to define "legally

enforceable" debt. Finally, Downs attacks the statute as unconstitutional for not requiring the agency to bring an action at law to collect the debt nor guaranteeing the debtor the right to a jury trial.

In fact, the statute clearly requires the agency to notify the debtor of the proposed action, to permit the debtor at least 60 days to object, to consider any evidence presented by the debtor, and to follow any other regulations prescribed by the agency Secretary. These statutory notice and hearing requirements have been filled out by Department of Education regulations. These regulations, in relevant part, describe a past-due legally enforceable debt eligible for IRS offset as one which is:

> (2) [D]elinquent for at least three months but has not been delinquent for more than ten years at the time the offset is made . . .
>
> * * *
>
> (5) With respect to which the agency has given the taxpayer at least 60 days to present evidence that all or part of the debt is not past-due or legally enforceable, has considered the evidence presented by the taxpayer, and determined that an amount of such debt is past-due and legally enforceable; and
>
> * * *
>
> (7) With respect to which the agency has notified, or has made a reasonable attempt to notify, the taxpayer that the the debt is past due, and unless repaid within 60 days thereafter, will be referred to the [Internal Revenue] Service for offset against any overpayment of tax . . ."

26 C.F.R. §301.6402—6T(b). Contrary to Mr. Downs' position, the applicable regulations define a legally enforceable debt and give further protection to the debtor's right to receive notice and to submit evidence. Further regulations ensure that the debtor, upon request, is entitled to administrative review

of written submissions and documents. 34 CFR §§30.24, 30.33. The debtor may also receive an oral hearing if he shows that such a hearing is necessary for the resolution of his case. 34 CFR §30.25. According to the Department of Education, Mr. Downs received a copy of these rules along with the notice of offset.

The only courts that have ruled on the adequacy of Education's notice have upheld the constitutionality of the notice procedures. *Spears, et al. v. Bowman, et al.*, C.A. No. 87-60087—AA (Opinion and Order June 6, 1988) and *Jones v. Bennett*, C.A. No. CV-H-5261-NE (Opinion and Order November 15, 1988) involved similar challenges by debtors to Education's notice and hearing procedures. In both cases, the court found the procedures were constitutionally adequate. This Court also finds that the statutes and regulations relied on by DOE in implementing the offset program meet constitutional due process requirements.

In addition to challenging the statutes and regulations involved here, Mr. Downs contends that the manner in which Education attempted to carry out those procedures was deficient with respect to his case. Plaintiff argues that the notice he received was inadequate because it failed to include:

> the name of the original lender, the date the debt was incurred, the date on which default occurred, the date on which the Department of Education paid the lender's claim, and the name of the school for which the loan was obtained.

The adequacy of a notice is measured "under all the circumstances." *Mullane v. Central Hanover Trust*, 339 U.S. 306, 314 (1950). Examined in its context, the notice sent to Mr. Downs of the proposed offset was certainly adequate. The debt in question arose out of a loan agreement for which plaintiff signed a promissory note specifying the terms of the loan. There is little room for confusion regarding the nature of the debt as a student loan agreement. Mr. Downs had received numerous prior notices regarding his student loan obligation.

The pre-offset notice came from USA Funds, the same party that had previously demanded payment from Downs for this debt.

Although the notice did not include details of the loan transaction, it clearly informed Mr. Downs of his right to request records pertaining to the debt. In fact, Mr. Downs exercised that right—requesting and receiving copies of the promissory note. As the court noted in *Jones, supra*, the fact that thousands of debtors who received the same notice challenged here had identified their debts, responded to the notice, and successfully presented their objections to the proposed offset demonstrates the adequacy of Education's notice procedure. In the present case, the Court finds that the notice sent to Mr. Downs informing him of the proposed offset and his right to object was constitutionally adequate.

Department of Education's Offset Action is Not Time-Barred

Mr. Downs also argues that the offset was improper because suit was barred by 28 U.S.C. §2415(a) at the time the offset occurred. 28 U.S.C. §2415 applies to actions for money damages brought by the United States. This statute's time limitation is inapplicable to Mr. Downs' case.

Like any other creditor, the United States has the right, recognized at common law, "to apply the monies of [its] debtor in [its] hands to the extinguishment of the amounts due [it] from the debtor." *Tatelbaum v. United States*, 10 Cl. Ct. 207, 210 (1986). That common law right was the basis of the government's offset of non-tax debts against claims by debtors for tax refunds. *See Cherry Cotton Mills v. United States*, 103 Ct. Cl. 243 (1945) *aff'd* 327 U.S. 536 (1945); *Luther v. United States*, 225 F.2d 495, 498 (10th Cir. 1954). The common law right of offset against tax refunds is now codified at 31 U.S.C. §3720A.

The Department of Education's right to collect a "past-due, legally enforceable" student loan debt by offset against a tax refund, as authorized under 31 U.S.C. §3702A(b), exists independently of any right the Department has to collect the debt by a lawsuit. Neither the authorizing statute nor any other establishes a specific limitation period barring collection by offset under that authority. A limitation period applicable to a lawsuit to collect a past-due loan does not apply to the Department of Education's collection of the debt by offset against a tax refund.[6] Under 31 U.S.C. §3720(b), a debt is "legally enforceable" without regard to whether the statute of limitations applicable to a suit to collect that debt has run. *Thomas v. Bennett*, 856 F.2d 1165, 1169 (8th Cir. 1988); *Gerrard v. U.S. Office of Education*, 656 F.Supp. 570, 574 (N.D. Cal. 1987).

Plaintiff Has No Right to a Jury Trial

In his final claim for relief, plaintiff contends that defendant's failure to provide him with a jury trial violated the Seventh Amendment. The Seventh Amendment's guarantee of the right to a trial by jury applies to "suits at common law." As discussed above, the Department of Education's offset action was taken pursuant to 31 U.S.C. §3720A; it was an administrative proceeding rather than an action to collect the debt by lawsuit. In 31 U.S.C. §3720A(b)(3), Congress directed the creditor agency to consider any evidence submitted by the debtor that might demonstrate that the debt is not past-due or not legally enforceable. Thus, the debtor may challenge the proposed offset and receive an administrative review of his or her challenge.

[6] In any event, as defendant points out, the applicable limitations period for a suit to collect plaintiff's loan is not 28 U.S.C. §2415(a), but U.S.C. §1091a(a)(4)(B) which authorizes such suits for a period of six years from the date of the assignment of the loan to the Secretary of Education. Mr. Downs' loan was assigned to the secretary on September 29, 1986.

The Seventh Amendment does not require an administrative agency to provide adjudication by a jury. The Court has recognized that:

> The Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication . . .

Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 454 (1977) *quoting Purnell v. Southall Realty*, 416 U.S. 363, 383 (1974). Congress may properly assign to the Department of Education and other agencies the authority to adjudicate challenges to proposed tax refund assets, and it did so in 31 U.S.C. §3720A (b). DOE did not violate the Seventh Amendment in failing to give Mr. Downs a jury trial in the course of an administrative proceeding.

Accordingly, for the reasons set forth herein, it is this 17th day of July, 1989, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendant Department of Education's motion for summary judgment is GRANTED;

2. That judgment BE and the same hereby is ENTERED in favor of defendant Department of Education and against plaintiff; and,

3. That the Clerk of the Court shall mail copies of this Memorandum and Order to all counsel of record.

Norman P. Ramsey
United States District Judge

In The United States District Court for the District of Maryland

---

William Downs
Plaintiff

v.

M. Peter McPherson, et al.
Defendants

Civil Action No. R-88-2662

Judgment Order

In accordance with the Memorandum and Order dated July 17th, 1989, it is this 17th day of July, 1989, by the United States District Court for the District of Maryland,

ORDERED:

That judgment is entered in favor of defendant Department of Education and against plaintiff.

Norman P. Ramsey
United States District Judge

United States Court of Appeals for the Fourth Circuit

FILED
June 4, 1990

No. 89-2772

William Downs
Plaintiff-Appellant

v.

Laura F. Cavazos, Secretary,
United States Department of Education
Defendant-Appellee

and

M. Peter McPherson, Acting Secretary,
United States Department of the Treasury;
United States Student Aid Fund, Inc.;
Internal Revenue Service,
both instrumentalities of the United States of America
Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and sunggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner with the concurrence of Judge Murnaghan and Judge Kaufman, United States District Court Judge sitting by designation.

For the Court,

CLERK

No. 90-374

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM DOWNS, PETITIONER

v.

LAURO F. CAVAZOS, SECRETARY,
DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Amendment right to trial by jury in suits at common law bars the United States from collecting the balance due on a defaulted student loan by setting off the debt against a tax refund owed to the borrower, where the amount of the debt has previously been ascertained by the United States through an administrative process in which the borrower had an opportunity to participate.

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In the Supreme Court of the United States

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OPINION BELOW

The opinions of the court of appeals (Pet. App. 9-10) and the district court (Pet. App. 11-23) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1990, and a petition for rehearing was denied on June 4, 1990 (Pet. App. 25-26). The petition for a writ of certiorari was filed on August 31, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. In the Higher Education Act of 1965, Tit. IV, 20 U.S.C. 1071 *et seq.*, Congress established the Guaranteed Student Loan (CSL) program to provide

subsidized loans to students. As a part of the GSL program, the federal government provides interest subsidies to students and guarantees private lending institutions against certain losses they may incur if the borrower should default on the loan. 20 U.S.C. 1078(a).

The repayment of loans made under the GSL program is guaranteed to the holder of the loan in the first instance by a state or private nonprofit guaranty agency. 20 U.S.C. 1078(b). In the case of default, the lender submits a claim to the guaranty agency and assigns the loan to it. The Secretary of Education, in turn, provides federal reinsurance coverage to the guaranty agency for the losses it incurs in honoring such claims by lenders. 20 U.S.C. 1078 (c). The Secretary is entitled to take assignment and seek repayment of a defaulted student loan after he has made a reinsurance payment to a guaranty agency. 20 U.S.C. 1080. All amounts collected are deposited in the United States Treasury in a designated insurance fund that is utilized in the administration of the GSL program. 20 U.S.C. 1081(a).

b. Unfortunately, the problem of defaulted and uncollected loans under the GSL program has become very serious. Largely in response to that problem, Congress, in the Deficit Reduction Act of 1984, Pub. L. No. 98-369, §§ 2652-2653, 98 Stat. 1152-1156, directed federal agencies to refer to the Secretary of the Treasury the past-due, legally enforceable debts they are owed, so that he may collect the amounts due by means of set-off against any federal tax refunds payable to the debtors. 26 U.S.C. 6402(d) and 31 U.S.C. 3720A (reproduced at Pet. 2-3). The statutory scheme requires the debtor to be given 60-days' notice of the proposed set-off and an opportunity to present

evidence that the debt is not past-due or is not legally enforceable. The referring agency must consider any evidence presented by the debtor and must make a determination regarding the past-due status and legal enforceability of the debt. 31 U.S.C. 3720A(b).

The Secretary of Education began to implement these debt-collection provisions of the Deficit Reduction Act in 1985. With respect to GSLs on which the Secretary has made reinsurance payments, the Secretary enters into agreements with the guaranty agencies pursuant to which the latter, as agents of the Secretary, provide notice of proposed tax-refund set-offs to GSL debtors, provide debtors access to records pertaining to their debts, and provide initial administrative review of debtor objections, including examination of documents submitted by the debtor and, in some cases, an oral hearing. 34 C.F.R. 30.24, 30.25. After completion of this initial review, the guaranty agency refers to the Department of Education the names of those debtors who do not object to the proposed tax-refund set-off and those whose objections the guaranty agency has determined to be meritless. Upon request, debtors who are dissatisfied with the guaranty agency's decision have a right to obtain a review of their objections by an official of the Department of Education and a right to present documentary and other relevant evidence. 34 C.F.R. 30.26. The decision rendered at the conclusion of that review constitutes the final decision of the Secretary of Education regarding the past-due status and enforceability of the debt. 34 C.F.R. 30.26(e). The Department then refers any account found to be past due and legally enforceable to the Internal Revenue Service, which sets off the amount due against any tax refund owed the debtor. The funds collected in this manner are deposited in the

Treasury and credited to the special insurance fund for the GSL program. 20 U.S.C. 1081(a).

2. a. Petitioner received a GSL in the amount of $2500 from the Equitable Trust Company of Baltimore in 1979 to finance his attendance at the University of Baltimore. The loan was assigned to the Student Loan Marketing Association (Sallie Mae), a private corporation chartered by Congress to serve as a secondary market for student loans. Pet. App. 15; 20 U.S.C. 1087-2.

Petitioner defaulted on his loan in 1983, after making only five payments totalling $213. Following numerous unsuccessful efforts to secure payment, Sallie Mae filed a default claim with the responsible guaranty agency, United Student Aid Funds, Inc. (USA Funds). USA Funds paid Sallie Mae's claim, and Sallie Mae assigned the loan to USA Funds. The Department of Education in turn reimbursed USA Funds for the amount the latter paid to Sallie Mae. Pet. App. 15.

In September 1986, having sought unsuccessfully to secure repayment from petitioner, USA Funds assigned title to the loan to the Department of Education. USA Funds then sent petitioner a pre-set-off notice, which informed him of his right to administrative review to challenge the past-due status or legal enforceability of the debt. Petitioner requested a copy of the promissory note, but he neither objected to the legal enforceability of the debt nor requested administrative review. Accordingly, the Department of Education referred the debt to the IRS for set-off, and the IRS set off this debt against a tax refund owed to petitioner in April 1987. Pet. App. 16.

b. Petitioner then filed this suit against the Secretary of Education in 1988, contending, inter alia,

that collection of the debt by means of administrative set-off against a tax refund owed petitioner violated the Seventh Amendment guarantee of trial by jury in "Suits at common law."[1] The district court granted summary judgment in favor of the Secretary. Pet. App. 11-23. In rejecting petitioner's Seventh Amendment claim, *id.* at 22-23, the district court relied on this Court's holding in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 430 U.S. 442, 454 (1977), that "the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication." The district court concluded (Pet. App. 23):

> Congress may properly assign to the Department of Education [DOE] and other agencies the authority to adjudicate challenges to proposed tax refund offsets, and it did so in 31 U.S.C. § 3720A(b). DOE does not violate the Seventh Amendment in failing to give [petitioner] a jury trial in the course of an administrative proceeding.

---

[1] Petitioner also named the Secretary of the Treasury, the IRS, and USA Funds as defendants, but they were dismissed as parties during the course of the litigation. Pet. App. 12; Gov't C.A. Br. 10.

In addition to raising a Seventh Amendment claim, petitioner contended that the statutory and regulatory scheme did not furnish constitutionally adequate notice and opportunity for a hearing and that the administrative offset was barred by the six-year statute of limitations in 28 U.S.C. 2415 on judicial actions for money damages brought by the United States. Those claims were rejected by the courts below, Pet. App. 10, 17-22, and petitioner does not renew them here.

c. In an unpublished, two-paragraph opinion, the court of appeals affirmed for the reasons stated by the district court. Pet. App. 9-10.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Further review is therefore not warranted. There are at least three basic flaws in petitioner's Seventh Amendment argument:

First, the Seventh Amendment guarantees a right to trial by jury only "in Suits at common law." In *Atlas Roofing*, an employer against which a civil penalty had been assessed in administrative proceedings for violation of the Occupational Safety and Health Act contended that Congress could not circumvent the Seventh Amendment guarantee by assigning adjudication of the penalty to an administrative agency. As explained below (see pages 9-10, *infra*), the Court rejected that claim, even though it was conceded that an adjudication of some sort was necessary in order for the government to assess the penalty. In this case, petitioner has not satisfied the necessary prerequisite for raising a Seventh Amendment objection of the sort involved in *Atlas Roofing*, because there was no requirement that the set-off at issue here be based on any adjudication of the parties' rights. Rather, a set-off is, at least in the first instance, essentially a non-judicial form of self-help, by which a party in possession of funds belonging to another person may apply those funds against an amount it is owed by that other person. Accordingly, even in a dispute wholly between private parties, no Seventh Amendment violation occurs if one of the parties sets off a debt in this manner, because there

is no "Suit[] at common law" to which the Seventh Amendment right might attach.

It has long been settled that, even in the absence of a statute expressly authorizing an administrative set-off, the United States "has the same right 'which belongs to every creditor, to apply the unappropriated moneys of the debtor, in his hands, in extinguishment of the debts due to him.'" *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239 (1947) (quoting *Gratiot* v. *United States*, 40 U.S. (15 Pet.) 336, 370 (1871)); see also *United States* v. *New York, N.H. & H. R.R.*, 355 U.S. 253, 260-261 (1957); *Wisconsin Central R.R.* v. *United States*, 164 U.S. 190, 211 (1896). Contrary to petitioner's apparent contention (Pet. 7), the United States need not first establish its right to recover on the debt in a lawsuit. See *United States* v. *Munsey Trust Co.*, 332 U.S. at 238-240; *Grand Trunk Western Ry.* v. *United States*, 252 U.S. 112, 120-121 (1920). It follows that there is no Seventh Amendment violation when the United States, without prior resort to judicial process, invokes the same right a private party has to apply another person's funds in its possession against a debt owed to it by that other person. Cf. *Sullivan* v. *Everhart*, 110 S. Ct. 960 (1990) (sustaining regulations permitting administrative "netting" of overpayments and underpayments of Social Security benefits).

Second, petitioner ignores the fact that, in challenging the government's set-off of his debt against his tax refund, he is, in essence, making a monetary claim against the government. Judicial actions on such claims against the United States do not carry the right to a jury trial under the Seventh Amendment because a suit against the sovereign was not one recognized at common law in 1791. *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981); *McElrath*

v. *United States*, 102 U.S. 426, 439-440 (1880); see also *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962); *Galloway* v. *United States*, 319 U.S. 372, 388 (1943).[2] It follows that when Congress relinquishes the United States' sovereign immunity with respect to a class of claims, it may, consistent with the Seventh Amendment, provide for adjudication of the claim in an administrative forum.

Under the GSL program, if the debtor is dissatisfied with the results of the administrative process and seeks to recover the amount withheld by the United States by means of administrative set-off, he may bring an action against the United States under the Tucker Act, 28 U.S.C. 1346(a)(2). *Gerrard* v. *United States Office of Education*, 656 F. Supp. 570, 572-573 (N.D. Cal. 1987). As pointed out above, it is well settled that the debtor would have no right to a jury trial in such a case. In fact, in *McElrath*, the Court noted that in a Tucker Act suit, the United States has a statutory right to file a counterclaim or set-off against the plaintiff, and the Court held that the Seventh Amendment's jury trial right is inapplicable to a counterclaim, just as it is to the plaintiff's principal action, because Congress may condition the waiver of sovereign immunity to the principal claim on the absence of a jury trial on all aspects of the case. 102 U.S. at 440. This reasoning applies equally to a *set-off* asserted by the government in a Tucker Act suit. *Ibid.* If the Seventh Amendment is inapplicable even where the government asserts its set-off in court, it follows a fortiori that the

[2] Petitioner's reliance (Pet. 6) on *Tull* v. *United States*, 481 U.S. 412 (1987), therefore is misplaced. *Tull* involved a suit *by* the United States rather than, as in this case, a claim *against* the United States.

Amendment is inapplicable where, as here, the set-off is accomplished administratively. Cf. *United States* v. *Munsey Trust Co.*, 332 U.S. at 239-240.

Third, even if this dispute were regarded as concerning a claim by the government against petitioner, the Constitution permits Congress to assign its adjudication to an administrative agency because it involves a matter of "public right." *Atlas Roofing*, 430 U.S. at 458. Petitioner attempts (Pet. 7-8) to characterize the dispute as one involving "private rights" that may not be adjudicated by an administrative tribunal by emphasizing that petitioner initially owed the debt to a private bank and that the government is the assignee. The government in this case, however, is not merely the assignee of a private debt in an otherwise wholly private transaction. To the contrary, petitioner's debt to the United States arises out of a federal aid program that is a matter of distinctly public right as that concept has been developed by this Court.

As explained above, through the GSL program, the government provides financial assistance to students in the form of interest subsidies and loan guarantees. Federal statutes and Department of Education regulations govern every aspect of the program, including student eligibility, terms of promissory notes, repayment requirements, disbursement of loan proceeds to borrowers, interest rates, interest subsidies, terms of guaranty agreements, and required collection efforts. See 20 U.S.C. 1071 *et seq.*; 34 C.F.R. Pt. 682. The government's claims arising out of the program therefore fall squarely within this Court's definition of "public rights," that is, "matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."

Thomas v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 585 (1985) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 67-68 (1932)). The fact that petitioner's debt was initially owed to a private lending institution is beside the point. The private lending institutions in the GSL program are, like the borrowers, participants in a government program. Petitioner has not cited a single decision of any court holding that Congress may not constitutionally assign to an administrative agency the adjudication of rights arising under a federal aid program such as the GSL program.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1990

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